these years you mentioned, '36 and '37. Practically all of these fees were paid in connection with tax matters for Mr. Costello—all but one item, I believe.

(Marked Defendant's Exhibit ZZ for identification.)

Mr. Fennelly: I offer in evidence certified copy of a judgment in the matter of Frank Costello, petitioner, against the Commissioner of Internal Revenue in the Tax Court of the United States, entered October 18, 1946.

Mr. MacMahon: No objection, your Honor, but there are other documents down in our office that we wish to introduce in connection with this and it will take us a few minutes to get them.

(Defendant's Exhibit ZZ for identification received in evidence.)

Mr. Fennelly: This is a decision of the Tax Court of the United States in the case of Costello against the Commissioner of Internal Revenue.

(Exhibit read to the jury.)

(1582) Mr. Fennelly: That is all, sir.

Mr. MacMahon: We may need to keep this witness here a few minutes.

The Court: I have some questions I desire to ask of Mr. Greenbaum.

I understood you to say that most of the fees as to which you have testified were for tax matters—in fact, they were all tax matters which you handled for the defendant except one item.

The Witness: Yes.

The Court: And that included the year 1941, fees of $4,000, I think you testified, that were paid in—

The Witness: No, the one that was not a tax matter is the first one, $1,000 in 1939. According to my information, all the rest of the fees were paid for tax purposes.

The Court: Very well.

And in 1941 do you know whether or not your firm was representing Mr. Costello, the defendant here, in connection with matters—1943, rather, whether they were representing him in connection with his tax matters for the year 1941?

The Witness: It is my understanding, but I was in the Army during that time, and my testimony is (1583) based upon my examination of the files. My brother was in charge.

The Court: Yes. Well, you were a partner in the firm at that time, weren't you?

The Witness: No, not while I was in the Army. I resumed my partnership.

The Court: You resumed your partnership after you came back, but you are familiar with the files.

The Witness: Since I got the subpoena in this case I have made it my business to look at the files, but that is my understanding.

The Court: Fees you were paid in—you weren't paid any in 1943, according to your testimony, but 1944 you were, is that correct?

The Witness: We were paid in 1944, yes.

The Court: But not in 1943.

The Witness: Nothing in 1943. I have the copy of the receipted bill for that year.

The Court: For what year?

The Witness: For the payment made in 1944.

The Court: Yes. But, no, I mean, as far as your records show there were no fees actually received in 1944—in 1943.

The Witness: Nothing in 1943, but the payment in 1944, that your Honor referred to, I believe, $5,000, (1584) was for services rendered in connection with tax assessments for the years 1936 to 1937.

The Court: Yes.

Let me see the exhibit—all of them.

The Witness: That has not been marked in evidence (indicating).

The Court: Let me see the ones that are in evidence.

(Papers handed to the Court.)

Mr. MacMahon: Your Honor, at Mr. Greenbaum's request we blocked out the service rendered on those exhibits. But Mr. Fennelly has opened up that subject and, therefore, may I submit that we should at this time be entitled to see the originals of these exhibits.

Mr. Fennelly: I have only opened it up to the extent, your Honor, to lay a foundation that these fees are deductible items from income tax.

The Court: Would you look at this sheet designated 3-A, which is part of Exhibit 336 in evidence and tell me if these items for February 2 and February 3 represent the fees for services rendered in the year 1944, or would they be likely to be for services rendered in 1943?

The Witness: Services rendered earlier than '44, because I notice the bill is dated January 14th (1585) and according to our records for work done

in connection with the assessments for the years 1936 and 7, so that they were paid in '44.

The Court: Now, in the light of that, Mr. Fennelly, I will hear you further, if you desire, either in the presence of the jury or out of it on the question of why 335 should not be received in evidence.

Mr. Fennelly: I do not think I have anything further to say that I have already indicated to you.

The Court: If you have nothing further than that, I shall overrule the objection and receive it.

Mr. MacMahon: May I read it to the jury, your Honor?

The Court: You may.

(Government's Exhibit 335 for identification received in evidence.)

Mr. MacMahon: This is a letter dated August 3, 1943 from Lawrence Greenbaum pursuant to a power of attorney, which is Government's Exhibit 335, written to Mr. Seymour S. Schweitzer, Collector of Internal Revenue, 341 Ninth Avenue, New York City.

(Mr. MacMahon reads Government's Exhibit 335 to the jury.)

Mr. MacMahon: On the letterhead of Greenbaum, (1586) Wolff & Ernst, the firm of which General Greenbaum is a partner.

Redirect Examination by Mr. Christy:

Q. Mr. Greenbaum, from Government's Exhibit 336 in evidence this item in 1946, carried here as $7,878.50 was

a disbursement by your firm for which you were reimbursed by Mr. Costello, was it not? A. It was apparently for the disbursements that I referred to in answer to his Honor's question, a few dollars more that rounded out that figure; that is right, with that qualification.

Mr. Fennelly: I have no further examination.

The Court: No, but Mr. MacMahon had sent down for some other records which he desires to introduce through this witness in connection with, I guess it was, that judgment, was it not?

Mr. MacMahon: That is right, your Honor.

The Court: Perhaps, so that that last exhibit that was just read would fit more in place with the jury, you might desire to read the power of attorney, which is also in evidence.

Mr. MacMahon: This is Government's Exhibit 335-A, and it is a certified copy of a power of attorney signed by Frank Costello—

The Court: I suggest you might suspend with (1587) that now because I see your associate is here, and I don't want to hold up General Greenbaum any more than is necessary.

The Witness: Thank you.

Mr. MacMahon: Your Honor, Mr. Seymour will take over this part of the examination. This is a phase of the case which he has prepared.

The Court: He may.

By Mr. Seymour:

Q. General Greenbaum, I believe you referred to a payment made to the Collector of Internal Revenue of certain taxes on behalf of the defendant, and counsel for the defendant has offered in evidence a certified copy of a

judgment in the Tax Court also relating to tax matters of the defendant.

Isn't it a fact that the payment made by your firm was in connection with a stipulation regarding the entry of that judgment settling matters pending before the Tax Court involving this defendant for the years '36 and '37? A. I am sorry, Mr. Seymour, I just don't know; I had nothing to do it with personally.

Mr. Seymour: Would you mark this for identification.

(Marked Government's Exhibit 337 for identification.)

(1588) Q. Do I understand, General Greenbaum, that it is your statement that you have no personal knowledge of this particular matter? A. That is right.

Q. Would you look, sir, at the third page of the photostat annexed to Government's Exhibit 337 for identification and tell me, sir, whose signature appears on the bottom of that letter? A. Theodore S. Jaffin, who used to be a partner in the firm.

Q. And he used to be a partner in your firm? A. He used to be a partner in my firm.

Mr. Seymour: Would you mark this?

(Marked Government's Exhibit 338 for identification.)

The Court: May I see the exhibit, General?

(Witness hands to Court.)

The Court: Thank you.

Edward S. Greenbaum—for Government—Redirect

Q. General Greenbaum, I hand you Government's Exhibit 338 for identification and I ask you to look at the photostatic document which is there certified, and would you tell us, sir, whether the signature of Mr. Jaffin appears on that document? A. It does.

The Court: May I see 338, please?
Mr. Seymour: Yes, your Honor (handing).
Would you mark this?

(1589) (Marked Government's Exhibit 339 for identification.)

Q. General Greenbaum, do you know of your own knowledge whether your partner Morris Ernst appeared on behalf of the defendant in the Tax Court proceeding in connection with which the judgment just entered—just offered by the defendant was entered? A. I don't know of my own knowledge, but I saw his signature on that paper you just showed me, Mr. Seymour. That is all I know about it.

Mr. Seymour: Would you mark this one?

(Marked Government's Exhibit 340 for identification.)

Q. General Greenbaum, I show you Government's Exhibit 339 for identification and I ask you to look, sir, at the signature at the foot of the document there certified over the name of counsel for petitioner. Do you recognize that signature? A. That is a photostat of Morris L. Ernst's signature, my partner.

Q. Finally, General Greenbaum, I show you Government's Exhibit 340 for identification and I ask you if you

recognize the signature at the end of the letter, on page 2 of that letter? A. Yes, I do.

Q. Whose signature is it? A. Theodore S. Jaffin, (1590) my former partner.

Mr. Seymour: At this time, if your Honor please, the Government offers Exhibits 337 for identification, 338 for identification, 339 for identification, and 340 for identification in evidence.

(A pause.)

Mr. Fennelly: Excuse me a minute, your Honor. I think part of this is already in evidence.

(A pause.)

Mr. Fennelly: I object to Government's Exhibit 337, which is a letter preceding the—

The Court: A letter what?

Mr. Fennelly: Which is a letter from Greenbaum, Wolff & Ernst to the Commission which led up to this judgment, and to Exhibit 338, which is merely a notice of appearance.

I have no objection to the stipulation which was the basis of the judgment, which is Government's Exhibit 339, and I object to 340, except for that part of it which is an affidavit of Frank Costello consenting to apply the amount of taxes which he had paid, and which the Court held had been overassessed as against him, that they be applied on Mr. Kastel's account.

Mr. Seymour: If your Honor please, may I be heard?

(1591) The Court: Yes, but let me see this.

Colloquy

(A pause.)

The Court: Settlement ultimately was consummated, wasn't it, in accordance with this arrangement?

Mr. Fennelly: Yes, and the stipulation which led to the judgment, stipulation I have no objection to. That is Exhibit 339.

The Court: Yes.

Mr. Fennelly: And the taxes—

The Court: And so much of 340 as consists of the defendant's affidavit?

Mr. Fennelly: That is right.

The Court: You agree to that?

Mr. Fennelly: Yes, which is his consent to have the money which he had paid, and which was held to be an overpayment, to have that applied on Mr. Kastel's account.

The Court: That is the way the settlement ultimately worked out?

Mr. Fennelly: That is right.

Mr. Seymour: If your Honor please, I submit that the purpose, the sole purpose, of the last exhibit introduced by the defendant, as shown both by the description he gave of that exhibit to the jury and again as shown by the argument to your Honor on these (1592) documents here, trying to emphasize the word "assessment," requires that the record be made clear to show that the assessment, the over-assessment, was only in a technical sense and not in a factual sense, in terms of the agreement reached between this defendant and other parties to the transaction, represented by these particular exhibits that are presently marked for identification and before your Honor.

We submit that the suggestion of an over-assessment on its face might well mislead the jury into thinking that there is something erroneous in fact in the total calculations of tax relating to the income involved in the period that the judgment relates to, the tax payment relates to, and these particular exhibits now pending before your Honor relate to.

We submit that these exhibits, made by the defendant's then attorneys on his behalf, laying the basis for the judgment which the defendant has now offered in evidence, are plainly relevant and admissible in order to explain the entire background and circumstances of that judgment.

Mr. Fennelly: They refer, the other exhibits that I have objected to, to a case involving Mr. Kastel and not to Mr. Costello. The paper I offered was a paper, certified copy of a judgment where the petitioner (1593) against the Commissioner of Internal Revenue was Mr. Costello, and the Court—

The Court: And what year was that for?

Mr. Fennelly: Involving '36 and '37.

The Court: And that resulted, did it not, in some money being due to the defendant?

Mr. Fennelly: Resulted in over-assessment of tax, of $20,000 in one year to Mr. Costello, and $12,000 in another, and then by the stipulation and affidavit he agreed that they could be applied on the taxes which the Government was claiming against Mr. Kastel, but as far as Mr. Costello was concerned, it was an over-assessment to him, and by his stipulation and by his affidavit he consented that the Government could apply that on Mr. Kastel's income tax.

The Court: Is there anything further with re-

spect to this for which you need General Greenbaum?

Mr. Fennelly: I don't.

Mr. Seymour: I don't believe we do, your Honor.

The Court: I know he will be glad to listen to the argument, but I imagine, and hope, he has other things to do.

The Witness: I have a bad cold, your Honor.

(Witness excused.)

The Court: If you will let me take all these (1594) papers, you go ahead and have your recess, and I will see what I can do about reading them a little more carefully.

All right, we will take our recess.

(Jury retires.)

(Short recess.)

(Jury not present.)

The Court: Now, Mr. Fennelly, I understand you have no objection to the stipulation.

Mr. Fennelly: That is right, which lead to the judgment.

The Court: What?

Mr. Fennelly: Which led to the judgment.

The Court: Yes.

Mr. Fennelly: That I offered. Yes, sir.

The Court: Nor have you any objection to that part of three hundred—let me see the stipulation so that we will know what we are talking about. The stipulation is contained in 339 for identification.

Mr. Fennelly: Yes.

Colloquy

The Court: That you do not object to. Nor do you object to so much of 340 for identification as consists of the affidavit of the defendant Frank Costello.

Mr. Fennelly: That is right.

The Court: Now, why is anything more than that (1595) needed, Mr. Seymour?

Mr. Seymour: Your Honor will recall, from the previous evidence, that in the years '36 and '37 the defendant's sole income was from his partnership with Phil Kastel. The Tax Court decision in Kastel v. The Commissioner determined that in fact the income that Kastel received which he shared with the defendant Costello was taxable in the first instance to Kastel at the time he received it as a partner in Bayou.

Now, your Honor will remember that Costello's arrangement with Kastel was that they were to split fifty-fifty. The effect of the over-assessment here and Costello's agreeing to have the over-assessment on his taxes credited to the deficiency on Kastel's taxes, simply has the effect of reducing their net income pro tanto as far as their receipts from Bayou Novelty are concerned in 1936 and 1937.

Now, absent a showing of the background of the settlement and showing the agreement between both Kastel and Costello, that instead of litigating the matter further they would just agree that Costello's tax could be credited to Kastel's deficiency, thereby coming out to the net effect that they both still got the same income for practical purposes, without that showing Mr. Fennelly might be in the position to argue to the jury, (1596) as he has already attempted to imply, that somehow the defendant Costello was overcharged his taxes in that year,

whereas in fact, even with the settlement, Costello's take-home pay out of Bayou remains the same as it would have remained had Kastel paid it in the first instance back in those years.

The Court: That may all be so. But why is it necessary, or, rather put it this way: Isn't all of the evidence that you need to argue to the contrary the proposition which you think Mr. Fennelly is going to offer supplied to you by the stipulation and Mr. Costello's affidavit? I am not attacking your theory now. I am only trying to rule on certain phases of documentary evidence that are offered. And it seems to me, with the affidavit, part of 348, and the stipulation 338 that you have all the factual basis you need. If you wish to consider the other exhibits again and point out to me why I am wrong in that, I will hear you.

Mr. Seymour: Well, your Honor, I believe our offer of the further papers perhaps was just motivated by caution, to be sure that we have the picture clear in the record.

The Court: Well, my inquiry is due to caution, too, because—

Mr. Seymour: So I understand.

(1597) The Court: —340 and some of these numbers have A, B and Cs on them, I am a little cautious about getting so much material around here that will be unmanageable.

Mr. Seymour: May I suggest one further step that we might take to complete the picture on the basis simply of the stipulation and of the affidavit. You will recall this morning, your Honor, I called to the Court's attention that there had been a stipulation on the record with respect to Exhibit 20. Exhibit 20, your Honor may recall, consists of photostats of the original assessment list

Colloquy

The Court: That is right.

Mr. Seymour: —in the Upper Manhattan District. I pointed out to your Honor at that time that last night I conferred with Mr. Fennelly concerning portions that we had blocked out, and at that time Mr. Fennelly pointed to one of the sheets in that exhibit which records the actual transfer of this tax payment to Kastel's account. At that time I agreed to block out that page until such time as it should become relevant.

Now, I submit, your Honor, that the defendant has made that page relevant in showing the completion of the transaction and the fact that Kastel's deficiency (1598) was transferred to New York to permit crediting from Costello's account to his. And therefore perhaps if we can restore that page in that exhibit, that combined with 339 for identification and the affidavit 340 for identification—

The Court: 338, I think it is 338, 339. You are right. 339 is the stipulation.

Mr. Seymour: I was going to suggest that perhaps 339 for identification and the affidavit, 340 for identification, might come close to completing the picture.

May I consult momentarily with Mr. MacMahon?

The Court: Surely.

The record of course will show, Mr. Reporter, that this discussion is being held out of the hearing of the jury.

Mr. Seymour: Your Honor, may we at this time—may I borrow the exhibit so I can refer to them by number?

The Court: Oh, yes, surely (handing).

Mr. Seymour: May we at this time, your Honor, withdraw the offer of Government's Exhibit 337 for

identification, being the letter of March 29, 1946 from the law firm to the Commissioner making the offer of settlement?

The Court: You may if you wish, but you have (1599) it marked for identification and identified.

Mr. Seymour: Oh, I mean to suggest, your Honor, just withdraw the offer.

The Court: The offer in evidence.

Mr. Seymour: Yes.

The Court: Yes, that you may do.

Mr. Seymour: What we would like to do with respect to this particular exhibit is reserve the right to reoffer it on Monday if after a review of the facts we can see further basis for it.

The Court: You may do that.

Mr. Seymour: Your Honor, we would like to treat Government's Exhibit 338 for identification the same way, since it establishes the competency of 337.

The Court: You may do that.

Mr. Seymour: And similarly with respect to 340 for identification, may we amend our offer in evidence at this time to apply solely to the affidavit of the defendant which is part of that exhibit, and perhaps with your Honor's permission we may remove that from the main exhibit and mark it 340-A at this time so that it may be received in evidence.

The Court: You may. It is included in the certified paper, is it not?

Mr. Seymour: No, these are original papers.

(1600) Would you mark this 340?

The Clerk: 340-A received in evidence.

Mr. Seymour: And may the record note that 340-A is the affidavit of the defendant removed from 340 for identification.

Colloquy

The Court: Right. Now, 339 and 340-A may be received in evidence. As to those I understand you have no objection.

Mr. Fennelly: No objection.

The Court: Very well.

Mr. Seymour: And, your Honor, may the page of 20, Government's Exhibit 20 in evidence, showing the crediting of the over-assessment on Costello's account to the account of Phil Kastel now be restored to that exhibit?

Mr. Fennelly: Now, that I object to, your Honor, because I had agreed to let in the affidavit of Mr. Costello which is the authority to do it, and I do not think that in Mr. Costello's assessment list should appear an assessment against Kastel.

Mr. Seymour: Your Honor, it is necessary to show that the Government fulfilled—

Mr. Fennelly: What is necessary—

Mr. Seymour: The steps authorized by them.

Mr. Fennelly: Mr. Costello authorized them to (1600-A) do it, and what is necessary to show that they did it and put Mr. Kastel's sheet of his assessment in this—Mr. Costello's assessment list.

The Court: I will allow it to be done. I think it is the only way to make it clear to the jury.

The Clerk: Government's Exhibit 339 for identification in evidence.

(1601) The Court: All right, let's get the jury in.

(Jury present.)

Mr. Seymour: Your Honor, may I have permission to describe to the jury the documents that have just been received?

The Court: Yes, you may.

Colloquy

Mr. Seymour: Ladies and gentlemen of the jury, Government's Exhibit 339 is a certified copy of the stipulation filed in the Tax Court of the United States on October 16, 1946, in the matter of Frank Costello, petitioner, against the Commissioner of Internal Revenue, respondent. The stipulation is signed by Morris Ernst as counsel for the petitioner, and the stipulation provided for the entry of a decision in that proceeding on the basis of the stipulation, and constitutes a stipulation on the part of the two signers to the stipulation, Morris Ernst for the petitioner, Frank Costello, and a representative of the Bureau of Internal Revenue to the entry of judgment.

Mr. Fennelly: I object to the paraphrase. I would like to read it. I will read it.

Mr. Seymour: I don't think it makes for very tasty reading, your Honor, but I will proceed.

The Court: Mr. Fennelly likes it read. Read it.

(Exhibit read to the jury.)

(1602) Mr. Seymour: I take it, Mr. Fennelly, you would like this read (indicating)?

Mr. Fennelly: No.

Mr. Seymour: With the Court's permission, I will summarize it.

The Court: No, I think if you are going to put it in, read it so there will be no question about it, if it isn't too long.

Mr. Seymour: All right, Government's Exhibit 340-A.

(Exhibit read to the jury.)

Mr. Christy: The Government calls Mrs. Sylvia Leichner.

Sylvia Leichner—for Government—Direct

SYLVIA LEICHNER, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination by Mr. Christy:

Q. Mrs. Leichner, where do you live? A. I live in Glen Cove, Long Island.

Q. Mrs. Leichner, did you ever operate a florist shop? A. Yes.

Q. And do you remember when you first opened that shop? A. I believe it was somewhere around 1938.

(1603) Q. What was the name of it? A. Fletcher and Annenberg.

Q. And was your name Annenberg? A. Yes.

Q. You were the Annenberg in that shop? A. Yes.

Q. Did it subsequently change its name? A. Yes, sir.

Q. What did it become? A. Sylvia Annenberg only.

Q. Did you change the name again? A. Yes, sir. I moved to another location.

Q. What was the name of the shop then? A. Greening and Annenberg.

Q. Greening and Annenberg? A. Yes.

Q. And did you change it once more? A. Yes, sir.

Q. What was the name of it then? A. Annenberg & Erickson.

Q. You first started operating your florist shop in 1938, is that correct? A. Yes, sir.

Q. Mrs. Leichner, do you know the defendant Frank Costello? A. Yes, sir.

Q. Do you see him in this court room? A. Yes (indicating).

Mr. Christy: May the record indicate, your Honor, that the witness has indicated the defendant Frank Costello?

The Court: Yes.

(1604) Q. Mrs. Leichner, while you were operating your florist shop—

Mr. Christy: I withdraw that question.

Q. The final name—

The Court: Are you still connected with the business?

The Witness: No, sir.

The Court: When did you sever your relationship?

The Witness: Early in 1946.

Q. That was the store which operated under the name of Annenberg & Erickson, is that correct? A. Yes, sir.

Q. During the period from 1938 through the time when you finally sold Annenberg & Erickson in 1946 was the defendant Frank Costello a customer of yours? A. Yes, sir.

The Court: I didn't hear the answer.

The Witness: Yes, sir.

Q. Would you speak up?

The Court: Would you keep your voice up?

The Witness: Yes.

The Court: It is important that the last juror and everybody at the last table hear you.

Q. And was he a customer of yours in the years 1938 through March or whenever it was you sold the store (1605) in 1946? A. Yes, sir.

The Court: That is fine. Thank you.

Q. And did the defendant Frank Costello come into the stores that you operated from time to time and purchase flowers? A. Yes.

Q. Did he purchase flowers at Christmas time? A. Yes, sir.

Q. Did he also purchase flowers at Eastertime? A. Yes.

Q. And did he also purchase flowers during the balance of the year? A. Yes.

Q. Mrs. Leichner, what would be your best recollection as to the minimum amount spent by the defendant Frank Costello in the florist shops?

Mr. Fennelly: I object to it unless the witness can first say whether she has any recollection whatsoever on the subject.

The Court: Sustained.

Q. Do you have any records of the operation of any of these florist shops? A. No, sir.

Q. They have been destroyed? A. Yes, sir.

Q. Do you remember approximately—

The Court: Do you have any recollection of the amount, the approximate amount, that this defendant who, you say, was your customer, spent at your shop in (1606) any one year?

The Witness: Approximately.

The Court: Very well. All right, you have a recollection.

Q. What would that recollection be— A. Would—

Q. —as to minimum amounts in the years 1938 through the time you—up through 1945. A. You mean annually?

The Court: Yes.

Q. Yes, annually. A. To the best of my recollection, I would say it would be, possibly, approximately around $2,000 a year minimum.

Q. Would that be a minimum amount? A. I would say so, yes.

Q. Would that have been in each of the years 1938, 1939, 1940, 1941, 1942, 1943, 1944 and 1945? A. Yes, sir.

Q. At the time you were operating the florist shop under the name of Annenberg & Erickson did you have an employee known as Albert Raty? A. No, sir.

Q. Was he one of the men that purchased the store from you? A. I believe he is connected with the man who purchased the store from me.

Q. He was not connected with you beforehand? (1607) A. He was not connected with me.

The Court: Was that name you mentioned the name of a witness who has previously testified here?

Mr. Christy: Yes, your Honor.

The Court: Just a minute.

Mr. Christy: It was yesterday morning, I believe, your Honor.

The Court: Yes. Yes, all right.

Q. Mrs. Leichner, under what name did you keep a record of the account of the defendant Frank Costello? A. Under the name of C. Frank.

Q. And did any other customers of yours ever charge any flowers to that account in the name of C. Frank? A. No, sir.

Mr. Christy: No further questions, your Honor.

Cross Examination by Mr. Fennelly:

Q. Miss Annenberg, what happened to your records in 1946, would you know? A. No, sir, I wouldn't know. You

mean the records of the first two or three months that I was in business?

Q. Whatever there were. Were records left in the shop? A. Not to my knowledge. I had all the records for a number of years, which I destroyed because they were just cumbersome and cluttering things up.

(1608) Mr. Fennelly: Might I have that exhibit you had yesterday?

The Court: I understood you to say that when you severed your connection with the business in 1946 you destroyed all the records which you had up to that time.

The Witness: I didn't destroy them in 1946. I did destroy them a number of years after.

The Court: I see, but you didn't leave them with your successors? You took them with you?

The Witness: I had my own records, yes. I kept my own records.

The Court: You kept your own records?

The Witness: Yes.

The Court: And sometime after 1946 you destroyed them?

The Witness: Oh, it must have been about two years or three years ago, after I moved to another address, I destroyed them because they were just in my way.

Q. Can you remember now back to 1938 and tell us that Mr. Costello spent—how much in that year for flowers? A. I said Mr. Costello spent about a minimum, to the best of my recollection, about a minimum of $2,000 a year.

(1609) Q. That is 1938, too? A. Usually ran about the same.

Q. And is this just a guess on your part? A. To the best of my recollection.

Q. Can you—have you any recollection, honestly, going back to 1938? You are now in 1954. Have you honestly any recollection of how much— A. I couldn't say to the dollar. I gave an approximate figure.

Q. Aren't you guessing at the sum? A. No, sir, I am not guessing.

Q. Now, how much was it per month? A. That I could not say. I answered on an annual basis.

Q. Could you tell us what it was per month? A. No, sir, I could not.

Q. Did you have any other customer who spent $2,000 a year? A. I did, yes. I had some.

Q. Can you tell me their names? A. Mr. Frank Erickson was a good flower buyer.

Q. Did he spend $2,000 a year? A. I would say he did, yes.

Q. And who else? A. Had a man by the name of Mr. Frank Gould, who used to spend considerable sums of money on flowers.

Q. $2,000 a year? A. Oh, yes, I would say so. (1610) More. I had lots, I had a man by the name of William Leeds.

Q. And in 1938 were you a partnership or a corporation? A. In—we were always a corporation.

Q. In 1938 where were you located? A. At 551 Madison Avenue.

Q. How long were you there in that shop? A. Oh, I would say about 5 years, I believe.

Q. How long? A. About 5 years.

Q. And that would bring you from 1938 to 1943? A. That is right.

Q. What was your gross business in the year 1938? A. I do not recall that.

Q. What were your expenditures in the flower shop for the year 1938? A. I couldn't tell you that either.

Q. What was your net profit in the florist business? A. I couldn't tell you.

Q. That is, the corporation? A. I couldn't tell you that now, either.

Q. Did you file an income tax return for the corporation? A. Positively.

Q. Coming to the year 1939, what was your gross in the florist shop? A. I do not remember.

Q. What was your rent in the florist shop, 1939? A. I don't remember.

(1611) Q. What were your expenses of the flower shop for 1939? A. I don't remember.

Q. And what was your net profit from the florist shop for 1939? A. I couldn't recall that either at this time.

Q. Coming a little nearer to 1940, what was your gross income in the florist shop? A. I wouldn't remember.

Q. What were your expenses in the flower shop for 1940? A. I wouldn't remember.

Q. And what was your net profit in the flower shop for 1940? A. I couldn't tell you that either.

Q. What was your rent in the flower shop for 1940? A. I don't recall.

Q. Now, on to 1941: What was your gross business of the flower shop? A. I don't remember.

Q. What were your expenses for 1941? A. I cannot remember that either.

Q. What was your net profit from the florist shop in 1911? A. I don't remember.

Q. Let us come to 1942: What was your gross business in the florist shop? A. I don't remember.

Q. What were your expenses in 1942? A. I don't remember.

Q. What was the net income from the flower shop? (1612) A. I don't remember.

Q. Do you remember in any year from 1943 on through

1946 what your gross was? A. No, sir, I do not remember any of it.

Q. Or what your expenses were? A. No, sir, I do not remember offhand.

Q. Or what your income was? A. No, sir.

Q. Or what your rent was? A. No, sir. The rent changed from year to year. I don't remember which year the rent was. Was a scaled rental all the way through, and I don't remember one year from the other at the moment.

Q. Yet you remember Mr. Costello bought $2,000 a year in flowers. A. Yes, sir.

Q. Did you testify before the grand jury that returned the indictment in this case?—A. No, sir.

Mr. Fennelly: That is all.

Mr. Christy: May I ask a few questions?

The Court: Go ahead.

Redirect Examination by Mr. Christy:

Q. Mrs. Leichner, at the time you were operating Annenberg & Erickson, did you have an employee named Grace Takata? A. Yes, sir.

Q. And did she work as a clerk in that—in your (1613) shop? A. Yes, sir.

Q. And she took orders from customers, did she not? A. Yes, sir.

Q. And she would be familiar with customers? A. Yes, sir.

Mr. Fennelly: I object to this as calling for a conclusion of the witness as to what was in the mind of the other.

The Court: Sustained, that last one.

Q. Did she remain at the shop after you had sold it? A. No, sir, I don't think so.

(1614) Q. Did she leave at the same time you did, do you remember? A. I believe she did, yes, sir, somewhere around that time.

Mr. Christy: I have no further questions, your Honor.

The Court: Very well. You may go.

(Witness excused.)

Mr. Christy: Your Honor, the Government renews its offer of Government's Exhibit 321.

Mr. Fennelly: No objection now, your Honor.

The Court: Very well.

(Government's Exhibit 321 for identification received in evidence.)

Mr. Christy: May I read from this exhibit, your Honor?

The Court: Yes.

Mr. Christy: This is a ledger sheet for the month of April 1947, and it carries an account under the name of C. Frank and shows a payment on April 24, 1947 of $649.55.

Mr. Fennelly: I would like to know if the Government has any more of these books of account of this florist shop.

Mr. Christy: That is all the Government has, your Honor.

(1615) The Government calls Martin H. Fitzmorris.

Martin H. Fitzmorris—for Government—Direct

MARTIN H. FITZMORRIS, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Christy:

Q. Mr. Fitzmorris, where do you live? A. New Orleans, Louisiana, 6834 Colbert Street—

Q. Will you keep your voice up just a little, Mr. Fitzmorris, so the last juror may hear you? A. I live at 6834 Colbert Street, New Orleans, Louisiana.

Q. Where are you employed, sir? A. Coleman E. Adler & Sons.

Q. And that is in New Orleans? A. That is in New Orleans.

Q. What kind of a firm is that, sir? A. That's a jeweler.

Q. And do you perform accounting services for that firm? A. Yes, sir, I do.

Q. And how long have you been there, sir? A. Since November 1st, 1949.

Q. Are you familiar with the books and records of Coleman E. Adler & Sons? A. I am, sir

Q. Are you familiar with the books and records that (1616) were kept by Coleman E. Adler & Sons in 1946? A. I am familiar with the procedure that was kept in 1946.

Q. And from your records do you know if you had any transactions with a Mrs. Costello? A. I do, sir.

Q. Have you those records, sir? A. Yes, sir (handing).

(Marked Government's Exhibits 341, 341-A and 341-B for identification.)

Q. Mr. Fitzmorris, I show you Government's Exhibits 341, 341-A and 341-B and I ask you if those are records kept by Coleman E. Adler relating to a sale to Mrs. Frank

Costello of 115 Central Park West in January 1946? A. Yes, sir, they are.

Q. They are? A. Yes, sir.

Mr. Christy: Your Honor, the Government offers Government's Exhibits 341, 341-A and B.

Mr. Fennelly: I object to them as irrelevant and immaterial.

The Court: Overruled.

(Government's Exhibits 341, 341-A and 341-B for identification received in evidence.)

Q. Mr. Fitzmorris, I show you Government's Exhibits 341; 341-A and B and ask you if they indicate a purchase by Mrs. Costello in January of 1946 of silver in the (1617) amount of $627.50 and for which she was allowed a credit of $205, leaving the total price of $422.50; and was that figure paid to Coleman E. Adler, that is $422.50, in March 1946—or in April 1946? A. April 1946. Yes, it was.

Q. Was it paid in cash, sir? A. Paid in cash.

Mr. Christy: No further questions.

The Court: Very well.

Cross Examination by Mr. Fennelly:

Q. Did you testify before the grand jury that returned the indictment in this case? A. No, sir, I did not.

Q. And this was actually table silver that was purchased, was it not? A. Yes, sir.

Q. I mean, 12 knives, dinner knives, and dessert knives, butter spreaders, forks—silver service for a dining table; is that right? A. That is right.

Mr. Fennelly: That is all.

Mr. Christy: Thank you, Mr. Fitzmorris.

May we substitute photostats for these, your Honor?

The Court: You may. You are precisely on the target.

Mr. Christy: Thank you, sir.

The Court: Now, ladies and gentlemen, we are (1618) off for the weekend until 10.30 Monday morning. Remember the instructions, don't talk about the case among yourselves or with anybody else, and just read the other parts of the newspapers and not any stories that may carry accounts of the trial, and if you happen to look at them, keep your minds open and don't pay any attention or draw any conclusions as a result of what you have seen there.

All right. 10.30 Monday morning. I wish counsel to wait for a few minutes.

(Jury retired.)

The Court: Now, I just want to suggest to counsel that if the Government's estimate that its last witness may be finished by Tuesday turns out to be accurate, we then are getting closer to the date when questions of requests to charge may be important, and I ask you to have that in mind because I tell you now that I shall want them three or four days before the time comes to use them, if the trial reaches that point. This is just your warning.

Mr. MacMahon: Your Honor, I might add that that little problem on that judgment sort of threw my estimate out a little bit, and it might be Wednesday or Thursday before we get there.

(1618-A) The Court: Well, the rule is still going

through that trial lawyers are not accurate estimators.

(Adjourned to Monday, May 3, 1954, at 10.30 a.m.)

(1619) New York, May 3, 1954, 10.30 a.m.

(Trial resumed.)

(Jury not present.)

The Clerk: If there are any witnesses present in the court room at this time they will please retire to the witness room.

The Court: Yes, sir?

Mr. Seymour: Your Honor may recall that on Friday, after the defendant had introduced his Exhibit ZZ, a judgment in the Tax Court, the Government offered several documents in evidence relating to and leading up to the entry of the decision which was constituted in that exhibit.

The Court: Yes. That was the matter of that stipulation.

Mr. Seymour: Yes, your Honor. And at that time your Honor may recall the Government withdrew its offer in evidence of some of these documents; and I believe we stated to the Court that we would like to have the opportunity of studying—

The Court: You reserved your right to reoffer.

(1620) Mr. Seymour: Yes. Now, after studying the record and the exhibits, your Honor, the Gov-

ernment again offers Exhibit 337 for identification, which is the letter of March 29, 1946.

The Court: From Greenbaum, Wolf & Ernst.

Mr. Seymour: Yes. And which is referred to and incorporated in the affidavit of the defendant, which was admitted as Government's Exhibit 340-A. May we hand these up to your Honor?

The Court: Yes.

(Mr. Seymour hands to the Court.)

The Court: Do you wish to look at this exhibit again?

Mr. Fennelly: My objection to it, your Honor, is that that was a letter months prior to the settlement and no—

The Court: Well, I don't really see what relevance it has to what we have before us here. Maybe I am obtuse on that. And will you enlighten me on it? What does this add in any way to the proof of any issue that we have here?

Mr. Seymour: Well, your Honor, on the present record there is merely a showing of taxes which were paid in '37 and '38, roughly, there were some later payments as to the '37 tax liability, and those tax payments (1621) were credited to a deficiency account of Kastel's.

The question of how that came to be, apart from the legal proceeding that caused that to come about, is one which we feel is not satisfactorily answered on the present record.

Now, this letter spells out how that came to be. It spells out the relationship of the two parties, Kastel and Costello, both in the enterprise of Bayou Novelty Company; further as to their arrangement on sharing the business, and finally, by defendant's

own statement that in that status they are related taxpayers.

Now, the point is that the Government does not want the record to imply that this crediting of tax somehow created a different obligation or a different liability or a different relationship between these two men, Costello and Kastel, than the original relationship which was simply that they were to share fifty-fifty Kastel's receipts from Bayou Novelty.

Now, on the record presumably it might be argued that this agreement by Costello to have the taxes paid to Kastel's account was in connection with another agreement which we do not have in evidence whereby Kastel was to repay that money to Costello, or whereby that was in extinguishment of some kind of a loan or other obligation.

(1622) What we want to make certain is that the record is clear that this was nothing more than carrying out the original agreement about the sharing of profits from Bayou and that the real effect—

The Court: Are you suggesting that the defense might offer evidence of this new arrangement?

Mr. Seymour: No, your Honor; I am suggesting that they might be in a position to argue that—

The Court: How could they argue it? What basis is there in the record now for any such argument? We have the testimony of the accountant Murphy—

Mr. Seymour: Yes, your Honor.

The Court: —as to what the relationship was. You had the tax returns filed by the Bayou Novelty Company and the Mint Company and the other enterprise; you have the tax returns for the same years filed by Kastel, in which he says that—I mean,

you have the partnership return in which he says this is the income of the partnership and so much is chargeable to Frank Costello, so much is chargeable to Mrs. Costello I think in one or two instances, and then you had Costello's returns reporting that amount of income.

Now, in the absence of some evidence to the contrary, it seems to me there is no possible basis on which it could be argued that there was any other (1623) arrangement than has been testified to.

Now, I don't think this is of big moment one way or the other, but it has a lot in it that has no relation to this case at all, and I am sure now about that because within its limits what you have here now is the basis that there was a settlement, certain money was available and a certain disposition was made of it.

Mr. MacMahon: The terms of that settlement are set forth in that letter, and the Costello affidavit, signed by him, incorporates that letter and makes that letter part of that settlement, and I submit—

The Court: I disagree with you, Mr. MacMahon. It refers to it but I don't think it incorporates it, but I might be wrong, and I will now look at it again.

Mr. MacMahon: Your Honor, I submit on its face Costello—

The Court: Just let me read it. It says, this authorization consent is made under a proposed offer of settlement referred to in the letters of my attorneys and so on. That is not incorporation, as I understand the word, when you are talking about incorporating one document and another.

This letter was prepared by competent attorneys. If they intended to incorporate the letters, they would have left no doubt that was what they had in mind.

(1624) Mr. MacMahon: I submit, if it isn't incorporated, it at least refers to it and, without the letter, there is nothing on the face of the stipulation signed by the defendant which in any way shows what the arrangement was for the settlement.

The Court: I don't think it is important in this case to show what the arrangement was. You have got a tax case here in which you charge that this defendant, beginning in a certain year, was worth plus or minus, and that from then on his financial affairs were such so that you expect to be able to argue to the jurors that by reason of what he spent in the years 1946, 1947, 1948, and 1949, he had more money and he had income which was not reported for his taxes.

Part of the expenditures that he made were moneys for taxes in this year—whatever the settlement was. The manner in which that settlement was arrived at I think is immaterial on the main issue.

Mr. MacMahon: Your Honor, I submit that there is a judgment here which shows an over-assessment of some $32,000. That money on its face—that judgment, would trickle back to Costello. The thing that makes it clear that it did not trickle back to Costello is that letter and the fact that in that letter--

The Court: The fact that it didn't trickle (1625) back to Costello is the judgment which says he said, you got it, it belonged to me, but put it over on Kastel's.

Mr. MacMahon: Yes, your Honor, but there was no claim for a refund filed and he waived a claim for refund, and that fact is what appears in that letter.

The Court: Mr. MacMahon, when a man says to

Uncle Sam, you have X dollars belonging to me; now, apply it on the tax, why, that in itself negates any claim for refund, and when the judgment is paid, it completely prevents the trickling back that you suggest might be argued.

Mr. MacMahon: Yes, your Honor, but—

The Court: That is, regardless of what the lawyers said in their letter. That is a fact.

Mr. MacMahon: May I, then, your Honor, urge this, that in the absence of some showing when A pays money to B, or for B's account, the legal presumption is that he is paying that money in discharge of a prior legal obligation to do so. In the absence of any explanation, that explanation, to negative—to negative the fact that this $30,000 was in repayment of some preexisting debt, we need that letter to show that fact.

The Court: I doubt that, Mr. MacMahon, because, what is perfectly obvious to me, it seems to me from the (1626) record, and the only explanation is this, Costello and Kastel had an arrangement whereby the earnings of Kastel were divided fifty-fifty between himself and the defendant here, Costello. Whether they were correct or incorrect in law, they adopted a practice which, apparently, they had been advised or they thought was the correct practice.

When Kastel got his money from any of these ventures, he filed a partnership return in which he showed that he had made X dollars, which had belonged to the defendant Costello, and, believing that the appropriate way to handle the taxes on that amount of money was for Kastel to pay the tax on his share and Costello to pay the tax on his share, they proceeded to do that. Then the Government

came along and said to Mr. Kastel someplace down in Louisiana, "That is not the way to do this. You are the man that earned the X dollars and you have got to pay the whole tax on it."

In the meantime, Costello had paid the tax on his share and Kastel on his.

So they had two accounts running, they had two cases: Kastel had underpaid and Costello had overpaid.

Now, the testimony from Costello that you have introduced through his statements to the grand jury, (1627) through the statement that he gave to Ronayne, that is the name, I think, of the agent down there, was— .

Mr. MacMahon: Yes.

The Court: —that he had 50 per cent of Kastel's.

In carrying out that 50 per cent arrangement, Costello goes down to the Government and he says, all right, if Kastel owes you money, here it is. I paid it and it belonged to me, now put it over on him.

There isn't any other possible explanation, it seems to me, that anybody can argue on the basis of the evidence that is here.

Mr. MacMahon: I submit your Honor understands it perfectly. It is simply I wanted to be in a position to state the significance of the letters.

The Court: If you think this letter is going to make it any clearer, and I am not any smarter than anybody else who pays attention to what is happening in front of him, if you think that this 3-page letter is going to help to clear it up to anybody who doesn't understand it now, I disagree with you. I think the letter is immaterial.

I think we have almost 400 exhibits in evidence,

and everything you need to argue is already in evidence, and I will sustain the objection to the offer.

However, if at sometime before the case is (1628) concluded, the state of the then-record, as it stands at that time, suggests to you that a basis has been laid to necessitate the admission of this, you may offer it again.

Mr. MacMahon: All right, your Honor.

Mr. Seymour: Thank you, your Honor.

The Court: Anything else?

All right, call in the jury.

(Jury present.)

The Court: Good morning, ladies and gentlemen.

Mr. Christy: The Government calls Mr. Sidney Robinson.

SIDNEY ROBINSON, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination by Mr. Christy:

Q. Mr. Robinson, where do you live? A. 704 Carlisle Street, Woodmere.

Q. Woodmere? A. Yes.

Q. Where are you employed? A. Copacabana, New York City.

Q. Where is that located? A. 10 East 60th Street.

Q. How long have you been with the Copacabana, sir? A. Since 1946, I believe.

(1629) Q. Mr. Robinson, do you know if the defendant, Frank Costello, of 115 Central Park West, had a charge

account at the Copacabana? A. There was a Frank Costello of 115 Central Park West who had a charge account at the Copacabana.

Q. Mr. Robinson, when a customer has an account are the checks that he signed posted to a ledger sheet? A. They are, sir.

Q. At the end of the month are they totaled up? A. They are, sir.

Q. And a bill sent to the customer? A. Yes, sir.

Q. Are those ledger sheets records kept by the Copacabana in the regular course of its business? A. It is, sir.

Q. Do you know if a search has been made for the records of Frank Costello's account relative to the years 1947, 1948, 1949? A. It has, sir.

Q. Were you able to find any of those records? A. No, sir.

Q. Have they been destroyed? A. I believe they were, sir.

Q. Is it the policy of the Copacabana to destroy the records after a period of time? A. Yes, the (1630) accounting department tells us when to eliminate those sheets.

Q. Did Frank Costello frequently pay his bill by check? A. Yes, sir.

Q. And did he sometimes pay two or three months bills with a single check? A. He did, sir.

Mr. Christy: No further questions, your Honor.

Cross Examination by Mr. Fennelly:

Q. Did you testify before the grand jury that returned the indictment in this case? A. No, sir.

The Court: All right, you may go.

Mr. Christy: Thank you, Mr. Robinson.

Israel Katz—for Government—Direct

(Witness excused.)

Mr. Christy: The Government calls Israel Katz.

ISRAEL KATZ, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination by Mr. Christy:

Q. Mr. Katz, where do you live? A. 275 Central Park West.

Q. What is your occupation, sir? A. I am a certified public accountant.

Q. And the name of your firm? (1631) A. David W. Katz & Company.

Q. Is your firm the accounting firm for the Copacabana? A. We are.

Q. Mr. Katz, in the performance of your duties in handling the account of the Copacabana do you have occasion to visit the Copacabana? A. I do.

Q. And to check their books? A. Correct.

Q. Mr. Katz, when letters are received by the Copacabana from Governmental agencies requesting information about customers' accounts, are such requests generally turned over to your firm for answering? A. Yes; all of such letters are referred to us where they deal with accounts of the company, and the letters—and responses to such letters are generally prepared by our office.

Q. Do you know if the Treasury Department about two years ago sent a request to the Copacabana for the account of Frank Costello? A. Yes.

Q. And do you know if a transcript of that account was prepared? A. One was prepared.

The Court: Did you say one was?

The Witness: One. I am saying—I am referring to an answer.

The Court: Yes; a transcript was prepared?

The Witness: That is correct, sir.

(1632) The Court: The question was, was a transcript prepared.

Q. Was a transcript prepared? A. Yes.

The Court: Did I understand you to say that a transcript had been prepared?

The Witness: Yes.

Mr. Christy: Transcript had been prepared.

The Court: Very well.

(Marked Government's Exhibit 342 for identification.)

Q. Mr. Katz, I show you Government's Exhibit 342 for identification, consisting of a letter and an attached page with some figures on it, and I ask you if that was the transcript prepared under your supervision from the books of the Copacabana relating to the account of the defendant Frank Costello. A. This is the transcript that was sent to the Treasury Department in answer to its request, but at the time it was submitted it did not contain certain pencil notations wliich are on here now.

The Court: May I see it?

(Paper handed to the Court.)

The Court: By "pencil notations," I take it you mean these check marks alongside the column on the left-hand side and then various figures?

(1633) The Witness: That is correct.

The Court: Which appear to be subtotals or computations of some kind.

The Witness: That is correct.

The Court: But everything in typewriting on there was on it at the time you signed it?

The Witness: That is correct, your Honor.

Mr. Christy: The Government offers Government's Exhibit 342 for identification and restricts its offer to the typing on the exhibit.

Mr. Fennelly: I don't know whether the Government also restricts its offer for 1948 and 1949.

Mr. Christy: There are figures on there for '50 and '51, which the witness will need to use in his testimony. We can mark that part only for identification.

Mr. Fennelly: Those I object to. I don't object to '48 and '49.

The Court: You don't object to anything—any part of the offer except what is beyond '49?

Mr. Fennelly: That is right.

The Court: Very well. At the present time we will receive only what includes up to and including 1949, and if the rest become relevant amend the offer. You need not mark them.

Mr. Christy: (To the Clerk) Mark it received.

(1634) (Government's Exhibit 342 for identification received in evidence.)

Mr. Christy: With that restriction as outlined.

Q. Mr. Katz, from Government's Exhibit 342, on the second page, there is a column with the date and a column with the amounts. Now, those figures in the second column,

are not the amounts of payment, are they? A. No, they are not.

The Court: Keep your voice up, will you please, Mr. Witness? I can't hear you.

The Witness: Yes, your Honor.

The Court: And it is important for the last juror and the gentlemen at the last table to hear you.

The Witness: I understand.

Q. Those are the amounts of the charges posted to Costello's account, is that correct? A. That is correct.

The Court: May I see that?

(Witness hands to the Court.)

Mr. Christy: Mr. Fennelly, may I have Defendant's Exhibit SS?

The Court: Very well. Thank you, Mr. Katz.

The Witness: You are welcome.

Q. Now, Mr. Katz, referring to Government's Exhibit (1635) 342, you notice in January, 1948, there is a charge of $179, is that correct? A. That is correct.

Q. Now, referring to Government's Exhibit 40 in evidence, which is the photostat of the bank statements of the defendant Frank Costello, I show you an entry on February 18, 1948, of $179. Now, the next payment is February—the next charge is February, 1948, of $86.85; again referring to Government's Exhibit 40 in evidence, on March 16, 1948, there is a withdrawal of $86.85; is that correct? A. That is correct. Do you mind if I take these off as we go along?

Q. Well, don't make any marks on them.

Now, in March there is a charge of $29.35, that is March,

1948, and I refer you again to Government's Exhibit 40 in evidence which shows on May 18, 1948, withdrawal of $29.35, the same amount. A. Right.

Q. In April there is a charge of $158.15, that is April, 1948, and again referring to Government's Exhibit 40, on May 18, 1948, there is a withdrawal in that amount, $158.15, is that correct? A. Right.

Q. Now, in May, 1948, there is a charge of $216.60; (1636) again referring to Government's Exhibit 40, on June 23rd there is a withdrawal, June 23, 1948, there was a withdrawal in the amount of $216.60, is that correct? A. That is correct.

Q. In June the charge was $154.43, and I refer you again to Government's Exhibit 40, which shows on July 23, 1948, a withdrawal in the amount of $154.43. A. That is correct.

Q. Now, in July there was a charge of $438.15, in September of $140, and in October, 1948, a charge of $56.70. A. That is correct.

Q. And the total of that is $634.85, is it not? A. That is correct.

Q. Again referring to Government's Exhibit 40 in evidence, I refer you to an item on December 2, 1948, showing a withdrawal of $634.85, the total of those three charges; is that correct? A. That is correct.

Q. Now, in November, 1948, the total charge was $224.10. A. That is correct.

Q. And in December, 1948, $151.50, is that correct? A. Right.

Q. Now, in February, 1949, the charge was $4.90, is that correct? A. Right.

(1637) Q. In January, 1949, the charge was $2,293.70. A. That is correct.

Q. I show you Defendant's Exhibit SS in evidence, which is a check of Frank Costello dated February 1, 1949, payable to the Copacabana in the amount of $2,199.05. Now,

sir, if you add the charges for November and December of 1948, and the charge for February, 1949, and the difference between the charge for January, 1949, and the amount of this check, Defendant's Exhibit SS, your total is $475.15, is that correct? A. That is correct.

Q. Again referring to Government's Exhibit 40 in evidence, I refer you to an item on March 16, 1949 which shows a withdrawal of $475.15, is that correct? A. That is correct.

Q. Now, the charges for March, 1949, and April, 1949, were $262.75, and $116.95, respectively, is that correct? A. That is correct.

Q. And the total of those two charges is $379.70, is that correct? A. That is correct.

Q. I refer you again to Government's Exhibit 40 in evidence and ask you, on May 23rd, or if there appears on May 23, 1949, a withdrawal in the amount of $379.70. A. There does; there is such a withdrawal.

Q. Now, Mrs. Katz, the transcript, Government's (1638) Exhibit 342, shows charges for the months of May; June, July, August, September and November of that year 1949, is that correct? A. That is so.

Mr. Christy: Your Honor, the Government would like to offer the balance of this transcript in order to arrive at certain computations, and these—

The Court: You have to lay the basis for it.

Q. Mr. Katz, the transcript also shows additional figures for 1950 and 1951, does it not? A. It does.

Q. In 1953 was—or, did the Copacabana write off a part of the charges?

Mr. Fennelly: Just a minute. I object to it.

The Court: Overruled.

Mr. Fennelly: As incompetent, irrelevant and immaterial.

The Court: Overruled.

Q. Did the Copacabana write off a part of the charges? A. It did.

The Court: For what period?

Q. Did that period cover—

The Court: Did they write off any charges that came due in the year 1949 or earlier?

The Witness: Yes, your Honor.

(1639) The Court: Tell us what they wrote off in 1949.

Q. Can you tell us how much was written off in 1949?

Mr. Fennelly: I object to it as incompetent, irrelevant and immaterial.

The Court: Overruled.

A. In September, 1953—

Q. Well, can you tell us how much was written off in 1949, charges? A. I will have to make certain computations, if I may.

Q. Will you?

The Court: Are you putting it on the exhibit or do you have—

Mr. Christy: I have provided him with a piece of paper, your Honor.

The Witness: He has provided me with a work sheet here.

A. The amount of such write-off that is applicable to the charges prior to—

Q. In 1949? A. —1949 total $138.65.

Q. $138.65? A. That is correct.

Q. Now, that transcript, Government's Exhibit 342, as you testified a few minutes ago, contains the charges for the balance of 1949— A. That is correct.

(1640) Q. For which we were unable to find checks on that transcript, Government's Exhibit 40. Can you tell me if the balance of those charges in 1949 has been paid? A. Yes, all of them with the—

Mr. Fennelly: I object to that. Excuse me. I object to it unless they fix the time of payment.

The Court: Yes, I think that that is so. He says they have been paid. Can you tell us when they were paid?

Mr. Christy: I will get to that, your Honor.

The Court: Can you tell us when they were paid?

The Witness: No, I am afraid I can't.

The Court: Can you tell us whether they were paid in 1949 or later?

The Witness: No, I can't.

The Court: Very well.

Q. But you do know that they have been paid, sir? A. That is correct.

Mr. Christy: I have no further questions, your Honor.

The Court: Very well.

Cross Examination by Mr Fennelly:

Q. Now, did you testify before the grand jury that returned the indictment in this case? A. No, sir.

(1641) Q. I show you Defendant's Exhibit PP-8, which is the bill of the Copacabana dated January 24, 1949, for $2,190-some. That item is included in your list, is it not? A. That is correct, sir.

Q. And that is for the Salvation Army charity party that Mr. Costello gave there? A. Well, other than the information that appears on that, I have no personal knowledge of what the nature of the charge—

Q. It appears on the face of the bill, does it not, Salvation Army? A. Yes.

The Court: Now, that is already in, Mr. Fennelly. This witness says he doesn't know anything about it.

Mr. Fennelly: The Government is putting it in again, and I should think it not unfair that I should demonstrate that that is one of the charges, that is all.

The Court: Well, I think that has been do sufficiently, but, further, we don't need any more.

Mr. Christy: I have no further questions.

Thank you, Mr. Katz.

(Witness excused.)

Mr. Christy: The Government calls Miss Helen Getschlig.

The Court: What is that last name?

Mr. Christy: Miss Getschlig, G-e-t-s-c-h-l-i-g, (1642) I believe is the way to spell it.

Helen Getschlig—for Government—Direct

HELEN GETSCHLIG, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination by Mr. Christy:

Q. Miss Getschlig, where do you live? A. 1710 Popham Avenue, Bronx.

Q. Where are you employed? A. Bureau of Motor Vehicles at 80 Centre Street.

Q. In New York here? A. New York City.

Q. How long have you been with the Bureau of Motor Vehicles? A. 43 years.

Q. Are you the certification clerk? A. I am, sir.

Q. And in your position as the certification clerk, are you familiar with the type of records that are kept? A. Yes, sir.

Q. By the Motor Vehicle Bureau? A. Yes, sir.

Q. Does the Motor Vehicle Bureau keep a record of persons who wish to register cars in New York State? A. Yes, sir.

Q. Now, when the owner of a car sells that car and the purchaser wishes to obtain a registration, they must file, or the purchaser must file a statement of transfer, is that correct? (1643) A. The purchaser must file an application, and the man who sells the car must file a transfer form.

Q. And those forms are also records kept in the regular course of your business? A. Yes, sir, they are, correct.

Q. Miss Getschlig, do you have any records going back prior to the year 1950? A. No, sir.

Q. Are all those records destroyed? A. Definitely.

Q. In accordance with the policy of the Motor Vehicle Bureau? A. Right.

(Marked Government's Exhibits 343, 343-A, B and C for identification.)

Mr. Christy: Mark that as 344.

(Marked Government's Exhibit 344 for identification.)

Q. The Motor Vehicle Bureau of New York provides photostats of records kept on file for people who wish them, do they not? A. For attorneys, the individual, and any city, state or federal department.

Mr. Fennelly: I am sorry, I can't hear the witness.

(Answer read.)

Q. Miss Getschlig, I show you Government's Exhibits 343 and 343-A, B and C for identification, and I ask you if those are photostats of records kept by the (1644) Motor Vehicle Bureau in the regular course of its business. A. Yes, sir.

Q. They are? A. This is a photostat of our photostat.

Q. That is a photostat of your photostat? A. That is right.

Q. But they are records kept by the Motor Vehicle Bureau in the regular course of business? A. That is right, for 3 years; that is all we are required to keep them.

Mr. Christy: Your Honor, at this time the Government offers Exhibits 343, 343-A, B and C, 344 for identification, and Government's Exhibit 277-C for identification.

The Court: Just let me look at 277-C for a moment, please.

(Exhibit handed to the Court.)

Colloquy

Mr. Fennelly: I object to them as incompetent, irrelevant and immaterial. (Handing exhibits to the Court.)

The Court: Well, we will take our midmorning recess now. No sense of you sitting there while we look at these.

(Recess.)

(Jury absent.)

The Court: I will hear you on this.

(1645) Mr. Christy: Your Honor will remember that Mr. Henschel will be unable to testify.

The Court: Yes.

Mr. Christy: Government's Exhibit 277-C is from the Cadillac people, which shows the sale of a car on May 18, 1948; shows that Henschel had listed the number of the car.

The Court: I am familiar with that, and then 343 is the—

Mr. Christy: 343 is the—

The Court: —document required to be filed with the Motor Vehicle Bureau by the Cadillac Company.

Mr. Christy: That is correct.

The Court: And 343-A is the document dated May 14th, showing registration by Henschel.

Mr. Christy: That is actually 343-C here, your Honor.

The Court: I think I corrected that. They weren't in order. In order to make them intelligible, you had better—

Mr. Christy: Shall we change it?

The Court: —get them in order, then. I thought I had changed them.

343-A is this registration of Henschel on May 14, 1948.

(1646) Mr. Christy: Yes, sir.

The Court: Which is within a day or two after he got the car.

Mr. Christy: That is correct.

The Court: The same day. We will put that down here. Then on May 28th, I think is the next date—

Mr. Christy: That is correct.

The Court: —that shows the transfer from Henschel to Loretta B. Costello.

Mr. Christy: That is correct. That is 343-B.

The Court: That is 343-B, and 343-C is the Loretta B. Costello registration.

Mr. Christy: That is correct, your Honor.

The Court: And 344 is a letter-certification from the Internal Revenue Bureau that there is no record of a gift tax—

Mr. Christy: That is right.

The Court: —paid in 1948 by Henschel.

Mr. Christy: Government's Exhibit 277-E, which is already in evidence, and consists of the repair orders from the Cadillac people—

The Court: Which shows that Mrs. Costello paid for a great many items of work on a car bearing that engine number.

Mr. Christy: And it also shows—

(1647) The Court: But that is after May 28th, is it not?

Mr. Christy: This is, actually, this is dated May 25th, your Honor, and that shows that the mileage on the car, when it was first brought in, was 123 miles. And it also shows the engine number, same engine number, as recorded on these other exhibits. And Government's Exhibit 310 in evidence, which was a record of the Dendo Insurance Company,

shows that she took out the insurance in May of 1948.

The Court: You are offering all these together now to lay a foundation, really, for the introduction of 277-C?

Mr. Christy: That is correct, your Honor.

The Court: And from that you expect to argue that because of the other documents and transactions which they represent the jury may draw the inference that that car was purchased with the money furnished by Mrs. Costello or the defendant?

Mr. Christy: That is correct, your Honor.

The Court: I cannot see that. Maybe I am wrong. I do not see how that inference can be drawn.

Mr. Christy: Well, your Honor, you show on May 18th the sale of the car to Joseph Henschel and one week later—

The Court: Yes. What you show is that the car (1648) —there is no doubt, you show the car in Henschel one day and a couple of weeks later you show it being transferred to Mrs. Costello, and her registration of it, and her payment of all the expenses thereat.

The fact, however, that you show no gift tax was paid, certainly it seems to me not to prove that it wasn't a gift.

It may be some indication that Henschel is in default of some taxes he owes the Government, but I don't think the inference you seek to draw is a proper one here.

Mr. Christy: Your Honor, as I understand the law, the law does not presume a gift from Mr. Henschel to Mrs. Costello.

The Court: Does it presume that Mrs. Costello didn't pay something for it?

Colloquy

Mr. Christy: Presume that she didn't pay something for it?

The Court: Yes.

Mr. Christy: I would say no.

The Court: Isn't all you have got here susceptible of either one or two things, either that she was the recipient of a gift from Henschel or that she paid Henschel something for it?

Mr. Christy: That is right.

(1649) The Court: Which you aren't able to show?

Mr. Christy: That is right.

The Court: But the fact that Henschel bought it one day for $4,200 and she got it two weeks later doesn't prove what she paid.

Mr. Christy: Government's Exhibit 277-C shows the purchase—

The Court: Shows the purchase price of the Cadillac.

Mr. Christy: —price of the car, yes, your Honor. And that price of $4,368.62 is corroborated by the price listed on Dendo's insurance record. It shows, actually shows, $4,400, which is a round figure, which I suggest must have been given to him by Mrs. Costello at the time she insured the car. The difference is actually only—

The Court: You say the law does not presume a gift. Does it presume a sale?

Mr. Christy: I don't think the law goes as far as to presume a sale.

The Court: I think not.

I will hear you, Mr. Fennelly.

Mr. Fennelly: It seems to me there are so many aspects that are missing from it, your Honor, that it is clearly incompetent. There is nothing to show (1650) that some third party might not have paid

Henschel money and said, "Here, you give this car to Mrs. Costello," which the Government hasn't shown.

In addition, suppose he sold it to her for $200, $500, just for the purpose of a sale?

In addition, on the subject of the Government tax, suppose something had happened to the car at the time? It was a gift; its value was less than $3,000. He still wouldn't have to pay a gift tax.

There are so many holes in it.

The Court: I didn't hear that last part.

Mr. Fennelly: Let us assume something had happened to the car and its value was less than $3,000, he wouldn't have to file a Government tax anyway.

There are so many aspects of holes in the proof that it is clearly incompetent.

Mr. Christy: The car came in after 123 miles, which is the approximate mileage on a new car whenever it is sold, and I would submit there is sufficient evidence for the jury to infer that Mrs. Costello paid Mr. Henschel this money for the car.

The Court: I will hear you.

Mr. MacMahon: Your Honor, I think the objection is one that goes to the weight only, and not to either the competence or relevance or materiality of this (1651) evidence.

The law presumes that Henschel obeys the law and, therefore, if it were a gift, Henschel would have filed a gift tax return.

The fact that he did not, with the legal presumption that he obeys the law, shows, and it is some weight, your Honor, some evidence of the fact that it was not a gift.

I think the objection goes only to the weight.

And there is sufficient evidence here, your Honor,

which the jury may draw the inference from, it seems to me, that Henschel was paid by Mrs. Costello for this car.

The only other inference susceptible here is one of a gift, and the absence of the gift tax return negatives that inference, your Honor.

Plus the common sense that people don't go around, it is contrary to all human experience that people go around giving away one-week old Cadillacs worth $4,400. I think your Honor can take judicial notice that that would be contrary to all human experience.

The Court: Well, I don't claim so much experience so as to be able to pass upon what all human experience is. I don't know whether people do (1652) that or not. In the group in which I have traveled all my life, it has not been done. Beyond that I cannot say.

Mr. MacMahon: I think your Honor's experiences are probably as well rounded as those of an average person. Certainly—

The Court: Take my word for it, they aren't. However, that is another problem.

Mr. MacMahon: And I think there is sufficient basis for the jury to draw the inference. I think the argument against it is only one of weight, which Mr. Fennelly is certainly free to make to the jury.

The Court: It may very well be. Frankly, what is bothering me is this question here of this kind of case we have, and, that is, a tax case where it is necessary to show just what they spent and where the evidence is pretty much in balance. I mean, they stand pretty neutral, it seems to me, and I am a little bit concerned about it. However, I am going to think about it a little more.

Colloquy

You may leave them here now. I will exclude them for a moment, but I am strongly of the view that it ought not to be received in evidence.

Mr. MacMahon: We do wish you would reconsider it in the light of the chronology of these facts.

It seems to me the only inference that can (1653) be drawn here is that either Henschel purchased the car with money given to him by Mrs. Costello as her nominee or that she paid him for the car within two days later.

The Court: I am the exception to your rule because I think that that clearly is not the only—I agree that it is one—

Mr. MacMahon: And the gift, your Honor. There is none other. One of those two. In the absence of the gift tax return and the presumption that Henschel complies with the law negatives the gift.

Mr. Fennelly: There is no proof of what the price was. Let us assume there was a sale, is there any proof that the sale might not have been $500 for some reason?

The Court: That is exactly what is running through my mind. There isn't any proof.

Mr. MacMahon: I think, your Honor, there is, the statement to the insurance company which again is one of weight, I agree, but there is a statement to the insurance company within a few hundred dollars of that price, and that is Mrs. Costello insuring that car, and that is a record kept in the regular course of the insurance company business, and that states within a few dollars the same price.

Mr. Fennelly: She could well buy it for $500 (1654) and insure it at a higher value.

The Court: The point Mr. MacMahon makes is that the application states what the price is she paid.

Mr. MacMahon: And I think you can take notice of the fact that in 1948 automobiles, particularly new ones, were difficult to come by, most difficult to come by.

The Court: So what?

Mr. MacMahon: So that again negatives the gift, your Honor. Cars had greater value in those days than they had right at the market where you bought them. You could buy a car and drive it around the block and sell it for even a greater price than what you paid for it. That was common knowledge in those days. In fact, your Honor, I think, you could take judicial notice of that.

The Court: All right, we have had enough on this now. Get the witness back and get the jury in.

Will you let me see that insurance exhibit, the application?

Mr. Christy: Government's Exhibit 310 in evidence (handing exhibit to the Court).

The Court: Let me see the other, that 343 series.

(Exhibits handed to the Court.)

HELEN GETSCHLIG, resumed.

Mr. Christy: I have no further questions, your Honor.

Cross Examination by Mr. Fennelly:

Q. Did you testify before the grand jury that returned the indictment in this case? A. No.

Q. You have testified before that the Motor Vehicle Bureau keeps a record of when there is a sale of a car

between one person and another, I think. A. When the party that buys the car registers it—

Q. Yes, but isn't it a fact that what you keep is, really merely a record of a transfer from one party to another? A. No, let me do it in my way, please? The dealer who sells the car issues NB-50. The party who wants to register it files an application, signs it, gets a plate, he keeps the stub. We keep the application and he gets the stub. If he is going to sell this car, on the reverse side of the registration card is an application for a transfer. He is transferring it to someone else—

The Court: Yes, but the point is whether he does that as a gift or he does it as a sale, you still have the same stub.

The Witness: We don't know anything about the money part.

(1656) Q. Your records show nothing he owes. So, if you go back to my original question, the record shows a transfer? A. That is correct.

Mr. Christy: No further questions, your Honor.

(Witness excused.)

Mr. Christy: The Government calls Mrs. Frances Gailbaud.

Frances Gailband—for Government—Direct

FRANCES GAILBAND, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination by Mr. Christy:

Q. Miss Gailband, where do you live? A. 123-35 82nd Road, Kew Gardens.

Q. What is your occupation, Miss Gailband? A. I happen to be in the fur industry, manufacturing.

Q. What is the name of your company? A. Ben W. Cohen Finer Furs.

Q. Is that in New York City here? A. 6 West 48th Street.

Q. How long have you been with Finer Furs, Miss Gailband? A. Well, approximately—let me think—about 22 years.

Q. Miss Gailband, have you ever made any sales to a Mrs. Loretta Costello? A. Yes, I did.

(1657) Q. Do you have records of those sales? A. I have records of some of them, yes. I have the record. I have them in my books.

Q. Do you also keep a ledger sheet of the account? A. Yes, we do, but these date back quite some time. I happen to have a couple of ledger sheets.

Q. May I have them, please? A. (Handing papers to Mr. Christy.)

(Marked Government's Exhibit 345 for identification.)

Mr. Christy: Your Honor, may we substitute photostats for the pertinent pages in this Government's Exhibit 345, which consists of 3 books?

The Court: Yes.

The Court: 345 consists of 3 books.

Mr. Christy: Yes, and may we mark the 3 pages? The first page is No. 59, the second page is No. 53, and the third page is No. 41, mark those as Government's Exhibits 345-A, B and C.

The Court: Very well.

Mr. Christy: This will be 345-D. That is ledger sheets.

(Marked Government's Exhibit 345-E for identification.)

Q. Miss Gailband, I show you Government's Exhibit 345 (1658) for identification, which consists of 3 books. Are those the day books or order books kept by Ben Cohen Finer Furs, Inc. for the years 1938, 1939, and 1940? A. Those are order books.

Q. Are those order books records kept by Ben W. Cohen Finer Furs in the regular course of its business? A. Yes.

Q. And do they reflect entries for Mrs. Costello? A. They do.

Q. I show you Government's Exhibits 345-D and E for identification and ask you if those are ledger sheets relating to the account of Mrs. Loretta Costello of 115 Central Park West. A. That is correct.

Q. And these ledger sheets are records kept by you in the regular course of business, is that correct? A. Yes, they are.

Q. And on Government's Exhibit 345-D the date is 1939, is that correct? A. '39, that is correct.

Q. And in— A. Goes over to '40.

Q. And on Government's Exhibit 345-E the date is 1940, is that correct? A. Yes, it is.

Mr. Christy: Your Honor, the Government offers Government's Exhibits 345-A through E for identification in evidence.

(1659) Mr. Fennelly: I object to them as irrelevant and immaterial.

The Court: Overruled.

The Clerk: Government's Exhibits 345 for identification through—

Mr. Christy: 345-A through E, not 345.

The Court: Not 345. The books are not going into evidence. It is just those papers 345-A, B, C, D, E, will be marked in evidence.

(Government's Exhibits 345-A through 345-E marked for identification received in evidence.)

Q. Miss Gailband, I refer you to Government's Exhibit 345-A in evidence, which is a page of your day book, and I ask you if there is an entry in there on January 31, 1939, showing the sale of a mink coat to Mrs. Costello in the amount of $2,500. A. It does.

Q. And I refer you to Government's Exhibits 345-D and E in evidence, and I ask you if you can tell me from Government's Exhibit 345-D if there was an additional amount paid by Mrs. Costello in the amount of $755. A. Yes.

Q. And from Government's Exhibit 345-E if in 1940 it shows payments by Mrs. Costello, in 1940, of $590. A. That is correct.

(1660) Q. And the $755 was paid in 1939, is that correct? A. In '39, that is correct.

Mr. Christy: No further questions, your Honor. May I substitute photostats for the ledger sheets, Government's Exhibits 345-D and E?

The Court: Yes, you may.

Frances Gailband—for Government—Cross.
Douglas Quick—for Government—Direct.

Cross Examination by Mr. Fennelly:

Q. Did you testify before the Grand Jury that returned the indictment in this case? A. No, sir.

Q. And on that first item was there an allowance on that? A. Mink coat?

Q. Yes. A. Yes, a $500 allowance. Let me see. She bought that mink coat and traded in the old one and there was a $500 allowance. In other words, the mink coat was $2,500 plus her old coat.

Q. Plus the old coat? A. Yes, meaning that it was $3,000 less 500.

Q. And the actual amount paid was $2,500? A. $2,500, yes, sir.

Mr. Fennelly: That is all.

Mr. Christy: Thank you, Miss Gailband.

The Witness: Are you through with me?

Mr. Christy: Yes.

(Witness excused.)

(1661) Mr. Christy: The Government calls Dr. Douglas Quick.

Douglas Quick, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination by Mr. Christy:

Q. Dr. Quick, are you a medical doctor? A. Yes, sir.

Q. Do you have an office here in New York City? A. I have.

Q. Dr. Quick, have you ever treated the defendant Frank Costello? A. Yes.

The Court: Will you keep your voice up, please, doctor, so that the juror last in the box and all of the gentlemen at the second table can hear you?

The Witness: Yes, sir.

Q. Dr. Quick, do you maintain a record of payments by your patients to your office? A. I do.

Q. And do you have a record relating to the payments by the defendant Frank Costello for services rendered by you to him, sir? A. I have.

Q. May I have them, sir?

(Witness hands.)

Mr. Christy: Will you mark these as one exhibit?

(1662) (Marked Government's Exhibit 346 for identification, consisting of 3 cards.)

Q. Doctor, I show you Government's Exhibit 346 for identification and I ask you if those are the records kept by your office relating to the payments by Frank Costello of 115 Central Park West. A. Yes, sir.

Q. And the first entry on the first card of Government's Exhibit 346 is 1947, is it not—1937? A. Yes, sir.

Q. And they cover the period 1937 through 1941, do they not, sir? A. Yes, sir.

Q. That is Government's Exhibit 346.

Mr. Christy: Your Honor, the Government offers Government's Exhibit 346 for identification in evidence. May we substitute photostats at the close of the doctor's testimony?

The Court: Yes, you may.

Mr. Fennelly: No objection, your Honor, provid-

ing the items in 1937 are limited to the period for November and December.

Mr. Christy: The Government will restrict its offer so as to apply only to the months subsequent to October 18, 1937.

The Court: Very well. They may be received.

(1663) (Government's Exhibit 346 for identification received in evidence.)

Q. Doctor, from Government's Exhibit 346 in evidence, have you a computation as to how much was spent in the years 1938 through '41? A. I have, sir.

Q. Will you tell me how much it was in 1938? A. May 10, 1938, payment of $35.

Q. And what was the total paid in 1939, sir? A. $550.

Q. And in 1940? A. $275.

Q. And in 1941, sir? A. $225.

Mr. Christy: No further questions, your Honor.

Cross Examination by Mr. Fennelly:

Q. Doctor, did you testify before the grand jury that returned the indictment in this case? A. I did.

Q. Before the grand jury that returned the indictment in this case? A. No, not—no, I did not.

Q. And you were treating Mr. Costello for cancer of the larynx?

Mr. MacMahon: Your Honor, I object to the question.

The Court: Overruled.

(1664) A. I did treat him for cancer of the larynx, yes.

Q. Doctor, maybe you can help me. I thought I heard

you say that in 1941 the amount of the bill was $225. All I find on this card is $25, isn't that right, paid on July 8th?

Mr. Christy: Doctor, if you refer to the card for 1940 I think you will find a notation on there.

A. On the back of the card 1940, January 8, '41, $200. $25 is on the other side, is it?

Q. It is on the card for July 8th, is that right? A. That is correct.

Mr. Fennelly: All right, thank you, doctor.

Mr. Christy: Thank you, Dr. Quick.

(Witness excused.)

Mr. Christy: The Government calls Frank Ciminera.

FRANK CIMINERA, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination by Mr. Christy:

Q. Mr. Ciminera, where do you live? A. Port Washington.

Q. Will you keep your voice up just a little so that the last man in the jury box may hear you, sir? A. Okay.

Q. What is your occupation, Mr. Ciminera? (1665) A. Mason contractor.

Q. Mr. Ciminera, when you perform work for somebody, do you send a bill and then retain a duplicate of that bill for your records? A. Yes, sir.

Q. Have you been able to locate any duplicates of your bills sent prior to 1950? A. No.

Q. You were unable to locate them? A. No, sir.

Q. You were unable to locate them, is that correct? A. No, sir.

Q. Will you keep your voice up just a little? Mr. Ciminera, did you ever do any work at the Costello residence in Sands Point? A. Yes, sir.

Q. Do you remember what kind of work that was? A. Concrete terrace.

Q. A concrete terrace? A. That is right.

Q. Mr. Ciminera, I show you Government's Exhibit 74 in evidence, which is a photostat of a check dated August 9, 1947, and signed by Loretta Costello and payable to Frank Ciminera in the amount of $100. Did you receive the original of that check? A. Yes, sir.

Q. And was it for the work that you performed at the Costello residence? A. Yes, sir.

The Court: Let me see it a minute.

(Mr. Christy hands the exhibit to the Court.)

(1666) The Court: All right.

Mr. Christy: No further questions, your Honor.

Mr. Fennelly: I object to the testimony and move to strike it out on the ground that it is irrelevant and immaterial, being Mrs. Costello's expenditure.

The Court: Overruled.

Cross Examination by Mr. Fennelly:

Q. Did you testify before the grand jury that returned the indictment in this case? A. No, sir.

Mr. Fennelly: That is all.

Mr. Christy: No further questions, your Honor.

The Court: You may go.

Mr. Christy: Thank you, Mr. Ciminera.

(Witness excused.)

Mr. Christy: The Government calls Harry De Jaager. I think that is D-e J-a-a-g-e-r, your Honor.

HARRY DE JAAGER, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination by Mr. Christy:

Q. Mr. De Jaager, where do you live? A. 133 Circle Drive East, in Elmont.

Q. Where are you employed, sir? (1667) A. Premier Awning Company in Richmond Hill.

Q. How long have you been with the Premier Awning Company? A. About 10 years.

Q. Are you the road foreman of the Premier Awning? A. I am, yes.

Q. In your position as road foreman, are you familiar with the books and records kept by the Premier Awning? A. I am, yes, sir.

Q. Do you know if the Premier Awning has ever performed any services for Mrs. Costello of Barkers Point Road, Port Washington? A. We have, yes.

Q. Do you have the record of those services? A. I have (handing).

(Marked Government's Exhibit 347 for identification.)

Mr. Christy: May the record indicate that Government's Exhibit 347 for identification consists of two ledger sheets.

Q. Mr. De Jaager, I show you Government's Exhibit 347 for identification and ask you if both of those sheets reflect entries for work done for Mrs. Costello of 5 Barkers Point Road, Port Washington? A. Yes, they do.

Q. And the entry on the first sheet is 1944, is it? A. That is right.

(1668) Q. And the last entry on the last sheet is 1949, is that correct? A. That is correct.

Mr. Christy: Your Honor, the Government offers Exhibit 347 for identification and restricts its offer to those parts which apply to the account of Mrs. Costello.

The Court: Very well.

Mr. Fennelly: I object to them as irrelevant and immaterial.

The Court: Overruled.

(Government's Exhibit 347 for identification received in evidence.)

Q. Mr. De Jaager, from Government's Exhibit 347 in evidence have you computed the totals that were paid in the years 1944 through 1949? A. I have, yes.

Q. Will you tell me how much was paid in 1944, sir? A. $192.25.

Q. And in 1945?

The Court: Pardon me. Just a minute, please. What is that '44 figure?

Mr. Christy: $192.25, your Honor.

The Court: Very well.

Q. And in 1945, sir? A. $14.25.
Q. 1946? A. $28.50.
Q. 1947? A. $73.90.
Q. 1948? A. $30.80.
(1669) Q. And 1949? A. $49.30.
Q. Referring to Government's Exhibit 347 in evidence, what was your figure for 1945? A. $14.25.
Q. I call your attention on that exhibit to two payments in 1945, is that not right, on May 2nd and September 24th? September 24th and May 2nd?

Mr. Fennelly: I object to the Prosecutor telling us there were two payments. I think he ought to ask the witness whether there were or not.

The Court: I think the record will show that what happened was that Mr. Christy said this card shows a payment on such-and-such a date in 1945, does it not? I think that is appropriate.

Q. Does it not show a payment on May 2, 1945, in the amount of $14.25? A. That is right, yes.
Q. And does it not also show a payment on September 24, 1945, in the amount of $14.25? A. Yes, this shows up here (indicating).
Q. So that the total in 1945 would be $28.50, is that correct? A. That is right, yes.
Q. And in 1946 there is a payment on June 6th of $14.25, is that correct? A. That is right.

Mr. Christy: No further questions, your Honor. May we substitute photostats at a later date for this Exhibit 347?
(1670) The Court: You may.

Harry De Jaager—for Government—Cross

Cross Examination by Mr. Fennelly:

Q. Did you testify before the grand jury that returned the indictment in this case? A. I did not, no.

Q. Then, do I understand that you have changed the amount that was paid in 1946 to $14.25? A. Yes, sir, I have. Yes, there is a change in the year there; if you will check this over with me there is an inversion there, these figures are run over, you see. These two figures here become one there (indicating).

Q. Now, the item under date of October 10, 1944, $14.25, is that right? A. That is right, yes.

Q. And in 1945 a payment in May and a payment in September of $14.25 each, is that right? A. That is right, yes, sir.

Q. And in 1946 $30, is that right? A. No, this is the '46 there. You see underneath '46 you have June 6th. This is the payment for 1946.

Q. The payment in 1946 is $14.25? A. Yes, sir. And 1947 you have three payments for different operations there.

Q. That is a total of $73.90? A. That is right, yes, sir. 1948 you have—this is split up into two units here which comes $30.80.

Q. $30.80. All right.

(1671) Mr. Fennelly: That is all.

Mr. Christy: No further questions, your Honor. Thank you.

(Witness excused.)

Mr. Christy: The Government calls Frank Nuzzolese.

Frank P. Nuzzolese—for Government—Direct

FRANK PAUL NUZZOLESE, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination by Mr. Christy:

Q. Mr. Nuzzolese, where do you live, sir? A. At No. 9 Vandeventer Avenue, Port Washington.

Q. What is your occupation, sir? A. Well, my brother and myself are owners of the Port Washington Ice, Coal & Wood Service.

Q. How long have you been working in that business? A. Oh, since I was 15 or 16 years old.

Q. Have you delivered ice to the Costello residence at 5 Barkers Point Road? A. Yes, sir.

Q. And do you keep records in your business of the deliveries to the various customers of yours? A. Yes, sir.

Q. Have you got those records, sir? A. Yes.

Mr. Christy: May we mark these as one exhibit, (1672) your Honor?

The Court: Yes.

(Marked Government's Exhibit 348 for identification.)

Mr. Christy: May the record note it consists of 19 books?

Q. Mr. Nuzzolese, I show you Government's Exhibit 348 for identification and ask you if those are the day books kept by the Port Washington Ice, Coal & Wood Service in the regular course of its business. A. That is right.

Q. Do those books reflect deliveries and payments to the Costello residence? A. Yes, sir.

Q. What is the date on the first book? A. That is July, 1945.

Q. Do they run through 1949, sir? A. Yes.

The Court: One for each week or—

The Witness: No.

The Court: —for each month?

The Witness: One for each month.

The Court: Very well.

Mr. Christy: Your Honor, the Government offers Government's Exhibit 348 for identification in evidence.

May we substitute photostats of the pertinent pages of those books?

(1673) The Court: Why don't you just offer the pages on which the entries are reflected?

Mr. Christy: All right. I haven't the photostats at this time, your Honor. The pages are all marked in the book.

Your Honor, the witness has prepared a memorandum of payments. Perhaps we could offer that in evidence. I will mark it for identification and let Mr. Fennelly check the figures against the books.

The Court: Very well.

(Marked Government's Exhibit 348-A for identification.)

Mr. Fennelly: I object to them as irrelevant and immaterial.

The Court: Overruled.

Mr. Christy: Your Honor, I withdraw my offer of Government's Exhibit 348 for identification and

may I substitute Government's Exhibit 348-A for identification?

The Court: Let us see how you get along with 348-A before you withdraw 348.

Q. From Government's Exhibit 348-A in evidence, Mr. Nuzzolese, can you tell me the total amounts of payments to the Port Washington Ice, Coal & Wood Service for services to the Costellos in 1945? (4674) A. The total amount?

Q. Yes. A. $29.50.

Q. And in 1946, sir? A. $25.50.

Q. And in 1947? A. $47.75.

Q. And 1948?

Mr. Fennelly: I didn't hear that.

Q. 1947? A. $47.75.

Q. And in 1948? A. $45.50.

Q. And in 1949? A. $108.75.

Mr. Christy: $108.75.

Q. That schedule, Government's Exhibit 348-A, was the schedule that you prepared from the day books kept by your business? A. Yes.

Q. Is that correct? A. That is right.

Mr. Christy: No further questions, your Honor.

The Court: Now, do you want to withdraw 348?

Mr. Christy: Yes, I will withdraw Government's Exhibit 348 and offer Government's Exhibit 348-A for identification.

The Court: Very well.

Frank P. Nuzzolese—for Government—Cross

Cross Examination by Mr. Fennelly:

Q. Do you testify before the grand jury that returned the indictment in this case? A. No, sir.

Q. Did Mrs. Costello order the ice that you delivered? (1675) A. Yes, sir.

Q. And she paid you, didn't she? A. Yes, sir.

Q. And the payments for, running through the summer there, for June, July— A. Yes; just the summer months.

Q. —August? A. Yes.

Mr. Fennelly: That is all.

(Marked Government's Exhibit 348-A in evidence.)

Mr. Christy: No further questions, your Honor.

The Court: You may go.

Mr. Christy: Thank you, Mr. Nuzzolese.

(Witness excused.)

Mr. Pierpoint: Your Honor, I have some documents which we might put in before the luncheon recess.

The Court: Very well.

(Marked Government's Exhibits 349 for identification, 349-A and 349-B for identification.)

Mr. Pierpoint: Your Honor, the Government offers 349, 349-A and 349-B for identification, which are certificates with respect to the purchase and redemption of United States Savings Bonds.

The Court: Well, the jury may go now. I am quite sure defense counsel cannot examine those papers before 1 o'clock.

We will adjourn now, ladies and gentlemen.

The luncheon period today will be a little longer (1676) than usual. We will adjourn to come back at 2:30.

Meantime, remember the instructions; don't talk about the case, and don't go looking in the newspapers for views about it, and if you do happen to see anything in there, don't pay any attention to it.

(Jury retires.)

Mr. MacMahon: I wish to ascertain what your Honor's decision is with respect to recalling those two grand jury reporters, Hough and Hart.

The Court: I hadn't thought about it.

Mr. MacMahon: We are about at the end of our procession of expenditure witnesses, your Honor, and coming now to documents and their agents. So that the order of our trial—

The Court: Mr. Fennelly, may I interrupt your examination of the exhibits long enough? Maybe you might enlighten me. You did say the other day, at a conference in chambers, that you desired to have the two grand jury reporters.

Mr. Fennelly: That is right, Mr. Hart and Pearl Hough.

The Court: I don't mean to suggest that it is trivial, but is it really important to you to get them back?

Mr. Fennelly: I deferred my cross-examination (1677) because the Government stated in court that they were grand jury stenographers who wanted to get away; and their statements were presented and we went over them, and I had understood, from what your Honor said, that they could be called back at